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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. ~~876~~ 130

ALVIE D. KILLIAN,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY and P. R. MALLORY & CO., Inc.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT, and BRIEF IN SUPPORT THEREOF.

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IN THE

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THE PENNSYLVANIA RAILROAD COMPANY and P. R. MALLORY & CO., Inc.

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable The Supreme Court of the United States:

The Petitioner, Alvie D. Killian, respectfully petitions this Honorable Court as follows:

1. To review the judgment of the Appellate Court of Illinois, First District, in the above cause which judgment was entered December 13th, 1948 (R. 173) and became final upon the denial of Petition for Leave to Appeal from the Appellate to the Supreme Court of Illinois, March 22nd, 1949 (R. 224).

2. For a Writ of Certiorari to the Appellate Court of Illinois, First District, for that purpose.

In this behalf, Petitioner shows:

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This suit was brought by Petitioner in the Superior Court of Cook County, Illinois, against The Pennsylvania Railroad Company [1] under the Federal Employers' Liability Act [2] and against P. R. Mallory & Co., Inc., [3] at Common Law, jointly, to recover damages for injuries received by Petitioner as an employee of Pennsylvania and an invitee in the Mallory plant at Gary, Indiana, on July 18th, 1945 caused by the negligent failure of Respondents to make his place of work reasonably safe (R. 41, 42).

The case was tried to the Court and jury. The usual motions to direct a verdict were made and overruled (R. 52, 53). The jury returned a verdict finding defendants guilty and assessing damages in the sum of $10,000.00 (R. 66).

Motions for judgment notwithstanding the verdict and for a new trial were made and overruled and judgment entered on the verdict (R. 66, 67, 69-79).

Defendants appealed from the judgment to the Appellate Court of Illinois, First District.

The questions raised on the appeal were (R. 14-15):

1. By Pennsylvania:

a) There is no proof that the Pennsylvania was guilty of any negligence, however slight, that contributed to the plaintiff's injuries.

---

1 Hereinafter referred to as "Pennsylvania."

2 35 Stat. 65, 45 U.S.C.A. Secs. 51-60.

3 Hereinafter referred to as "Mallory."

b) The Pennsylvania was, under firmly settled law, entitled to a directed verdict or to a statutory judgment notwithstanding the verdict.

2. By Mallory:

a) The Plaintiff was guilty of contributory negligence as a matter of law and as a matter of fact, and therefore a verdict should have been directed for this defendant.

b) The verdict is contrary to the manifest weight of the evidence.

No questions were raised as to the admission or refusal to admit evidence; the giving or refusing to give instructions; the amount of the verdict, or as to any other matter or incident occurring at the trial.

Mallory questioned the weight of the evidence but did not seriously argue the question.

The Appellate Court, on the ground that the Petitioner was the Pennsylvania Railroad and, himself, responsible for making the place of work safe, held that the trial court should have directed the verdict requested in favor of each Respondent and reversed the judgment of the trial Court.

Petition for rehearing was filed and denied (R. 174, 175).

Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Illinois was seasonably filed (R. A.) and was denied March 22, 1949 (R. 224).

Petitioner contends that in reaching the above conclusion the Appellate Court of Illinois, First District, deprived Petitioner of a jury trial in a case in which the undisputed facts strongly supported the verdict of the jury and thereby the Court ruled contrary to the provisions of the Federal Statute, 45 U. S. C. A., Section 51, and the principles of law announced by this Court in *Wilkerson* v.

McCarthy, 336 U. S. 53, 69 S. Ct. 413; *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 69 S. Ct. 275; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409; *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545.

The effect of the decision is to deprive Petitioner of his right under the Constitution of the United States to have his case tried by a jury.

II.

JURISDICTIONAL STATEMENT.

This Court's jurisdiction is invoked under Title 28 United States Code, Judiciary and Judicial Procedure, Section 1257, Paragraph 3, Public Law 773, 80th Congress, 67, effective September 1, 1948.

The judgment to be reviewed is a final judgment rendered by the highest Court of the State of Illinois in which a decision could be had under Illinois law making an Appellate Court judgment final upon denial by the Supreme Court of Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Illinois.

The judgment is a decision involving rights, privileges and immunities specially set up or claimed by Petitioner under a United States Statute, The Federal Employers' Liability Act, 35 Stat. 65 (45 U. S. C. A., Secs. 51-60) April 28, 1908, as amended.

III.

THE QUESTIONS PRESENTED.

The ultimate questions to be decided in this case are:

1. In this case, involving federal rights under the Federal Employers' Liability Act, did the Appellate Court err in holding that the trial Court should have directed a verdict as to each Respondent?

2. Was there sufficient evidence of negligence on the part of Pennsylvania in failing to use ordinary care to furnish Petitioner a reasonably safe place in which to perform his duties to justify the trial Court in submitting the case to the jury and to require the Appellate Court of Illinois to abide by the verdict rendered by the jury?

3. Did Petitioner, by reason of the fact that he was conductor in charge of the operation, become the vicarious agent of either or both Respondents with respect to the existing dangerous condition of the place of work, so as to deprive him of his employee status entitling him to the benefits of the Act?

4. Did the Appellate Court's conclusion that the trial Court should have directed a verdict for each of the Respondents, deprive the Petitioner of his constitutional right to the benefit of the jury's verdict in a case in which there is a reasonable basis to be found in the evidence for the verdict in his favor?

IV.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

It is alleged in the Complaint (R. 42) and admitted in Pennsylvania's Answer that Petitioner was an employee of Pennsylvania and that at the time of the accident, both Petitioner and Pennsylvania were engaged in interstate commerce (R. 49).

Section 1 of the Act, as amended in 1939[4], among other things, provides:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purposes of this Chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Chapter."

The Appellate Court in its opinion said (R. 5):

> "At the time and place of this accident, according to his own testimony, plaintiff himself was the agent of the railroad company charged with the duty of keeping this spur track clear for the safe movement of his train. Under such circumstances, this became a safe or an unsafe place to work according to whether or not plaintiff performed or failed to perform his duties."

And again the Court said (R. 8):

> "We are of the opinion that the Plaintiff should not claim damages for injuries resulting from a dangerous condition which, by omission to do his duty, he, himself, creates."

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[4] 53 Stat. 1404, 45 U.S.C.A., Sec. 51.

Only on this erroneous theory of Petitioner's status could the Court have found that Pennsylvania was free from any negligence and that Petitioner was guilty of such contributory negligence as to bar his action against Mallory.

Petitioner merely testified that he was conductor in charge of the movement and as such was responsible for getting the train safely into and out of the plant. He did not testify that that duty extended to making the place a safe place in which to perform his duties.

His duties were all determined by the order of his superiors in the employe of Pennsylvania to deliver a car of coal in the Mallory plant and the evidence is not disputed that the track over which he must proceed to perform those duties was always covered with barrels, cylinders, steel and everything that came out of the plant (R. 93, 97, 115, 126).

Neither is it disputed that both Pennsylvania and Mallory were repeatedly warned of this condition (R. 94, 132).

There is no evidence in the record that he failed to perform any duty growing out of the nature of his task.

The evidence amply shows that these duties occupied all of his time prior to the accident, one of which duties was to flag a crossing while other crew members removed an empty coal car from the plant preliminary to the spotting of the loaded car of coal (R. 94, 95, 97, 158, 159).

From all of this evidence the jury could and undoubtedly did infer that his failure to look and see that one of the barrels had not been moved by Mallory's gate man far enough for safe clearance, was due to his occupation with these duties, and that he could justifiably rely upon other crew members who had twice moved over the track with the train after Mallory's gateman had removed the stuff

from the track at Petitioner's direction and prior to the accident, to detect and warn him of the close proximity of the barrel which was still a part of the mass of barrels and stuff allowed to be and remain on the track by Respondents.

The Court's decision went against Petitioner, solely on the theory that he, because he was conductor in charge of the movement, was the alter ego of both the Pennsylvania and Mallory, and was therefore chargeable with the duties to make the place safe for the performance of his duties. Petitioner was therefore treated as an employer and not as an employee under the Federal Act and on that basis deprived of the benefit of the jury's verdict.

For these reasons the judgment of the Appellate Court is not only contrary to principles announced by this Court in the cases above cited, but is contrary to the provision of the statute itself, quoted above.

For all of these reasons this Court should allow the writ in order that it may exercise its power of supervision in a case involving rights under a federal statute.

Prayer.

Wherefore, for the reasons above given, Petitioner respectfully prays that a writ of certiorari be issued to the Appellate Court of Illinois, First District, to the end that this cause may be reviewed and determined by this Court and that the judgment of the Appellate Court of Illinois be reversed and for such other and further relief as to the Court shall seem just.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

Killian v. *Pennsylvania R. Co., et al.*, 336 Ill. App. 152, 63 N. E. (2nd) 834, (abstract only); R. 1-13 (opinion in full).

II.

JURISDICTIONAL STATEMENT.

This Court's jurisdiction is invoked under Title 28 United States Code, Judiciary and Judicial Procedure, Section 1257, Paragraph 3, Public Law 773, 80th Congress 67, effective September 1, 1948.

The judgment to be reviewed is a final judgment rendered by the highest Court of the State of Illinois in which a decision could be had under Illinois law making an Appellate Court judgment final upon denial by the Supreme Court of Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Illinois.

The judgment is a decision involving rights, privileges and immunities specially set up or claimed by Petitioner under a United States Statute, The Federal Employers' Liability Act, 35 Stat. 65 (45 U. S. C. A., Secs. 51-60) April 28, 1908, as amended.

Statutes Involved.

1. Every common carrier by railroad while engaging in commerce between any of the several states * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.[5]

2. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.[6]

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[5] 35 Stat. 65, Sec. 1; 53 Stat. 1404, Sec. 1; Title 45 U.S.C.A., Sec. 51.
[6] Section 1257, Public Law 773, 80th Congress, 67.

III.

QUESTIONS PRESENTED.

The ultimate questions to be decided in this case are:

1. In this case, involving federal rights under the Federal Employers' Liability Act, did the Appellate Court err in holding that the trial Court should have directed a verdict as to each Respondent?

2. Was there sufficient evidence of negligence on the part of the Pennsylvania in failing to use ordinary care to furnish Petitioner a reasonably safe place in which to perform his duties to justify the trial Court in submitting the case to the jury and to require the Appellate Court of Illinois to abide by the verdict rendered by the jury?

3. Did Petitioner, by reason of the fact that he was conductor in charge of the operation, become the vicarious agent of either or both Respondents with respect to the existing dangerous condition of the place of work, so as to deprive him of his employee status entitling him to the benefits of the Federal Employers Liability Act?

4. Did the Appellate Court's conclusion that the trial Court should have directed a verdict for each of the Respondents, deprive the Petitioner of his constitutional right to the benefit of the jury's verdict in a case in which there is a reasonable basis to be found in the evidence for the verdict in his favor?

IV.

SUMMARY OF THE ARGUMENT.

There is an abundance of evidence in the record to sustain the verdict of the jury.

The Appellate Court adopted the untenable theory that Petitioner, by reason of the fact that he was conductor in charge of the operation, became the vicarious agent or alter ego of Pennsylvania; that the duty of Pennsylvania to make the place of work safe became Petitioner's duty and that if the place was unsafe it was because Petitioner failed to perform this duty to make it safe.

In reaching this conclusion the Court pushed aside the evidence bearing upon the failure of Pennsylvania to perform its duty to provide a safe place for its employees to work and selected the point in the evidence when the train was moving over the track on its third trip after the barrels had been removed from the track and Petitioner swung on to the leading car at Moore Avenue, so as to be in a position to spot the loaded coal car at the delivery point.

The Court also pushed aside the fact that Petitioner was engaged immediately prior to the accident in flagging the crossing at Moore Avenue to prevent injury to Mallory's employees and to keep trucks from blocking the tracks and from striking or being struck by the train.

In ignoring all of this evidence, the Court treated the barrel or barrels that caused the accident as being wholly unconnected with the mass of barrels and other stuff that Respondents had allowed to clutter up the track, which was the place of work for Petitioner and other employees; treated Petitioner as the alter ego of Pennsylvania; placed the responsibility for the position of that barrel

upon Petitioner and thus relieved Pennsylvania from any negligence whatsoever and found Petitioner, himself, guilty of negligence, so as to bar his action insofar as Mallory was concerned.

The Court thus recast Petitioner, an employee, in the role of the Railroad and Mallory in respect to the safety of the place and the premises and deprived him of the benefit of the jury's verdict based upon all of the evidence including that pushed aside by the Court.

The judgment of the Appellate Court, based as it is upon the narrow and erroneous theory it adopted, violates the applicable principles announced by this Court; violated Section 1 of the Federal Employers' Liability Act by taking Petitioner from under its provisions in making him the Master instead of the Servant entitled to the benefit of the provisions of the Act and is, for these reasons erroneous and should be reviewed and reversed by this Court.

V.

STATEMENT OF FACTS.

Petitioner is an employee of Pennsylvania. He began work October 15, 1913 as a brakeman. He was promoted to conductor (R. 92) and had thirty-two years of experience in railroading.

He had been in and out of the Mallory plant over a period of years and had, at the time of the accident, been on Job 12B, on which he was engaged at the time of the accident, for five or six weeks (R. 93).

The crew on this job consisted of an engineer, a fireman, two brakemen and a conductor. On July 18, 1945, the date of the accident, plaintiff was acting as conductor (R. 108).

The following Rules of Pennsylvania were on that date in effect:

Rule 103a (R. 107):

When a train is shifting over a public crossing at grade not protected by a watchman nor by gates, a member of the crew must protect the crossing in advance of each movement over the crossing unless otherwise provided.

Rule 106 (R. 157):

Both the conductor and the engineman are responsible for the safety of the train and the observance of the rules, and under conditions not provided for by the rules, must take every precaution for protection. *They shall require assistance from the trainmen and firemen in all things requisite for the safe and prompt movement of their train.* (Italics ours.)

Rule 108 (R. 109):

In case of doubt or uncertainty the safe course must be taken.

Safety Rule 1507 (R. 157):

On Engines, Cars or Trains.

* * *

Maintain lookout in the direction engine or car is moving, to avoid coming in contact with structures alongside of or over track, or with cars, engines, or trains on adjacent tracks. (Bridges, buildings, coal chutes and aprons, fences, cattle guards, mail cranes, platforms, poles, stock chutes or pends, switch standards, lamps, targets, signals, tunnels or standpipes, etc.)

This paragraph follows a half dozen other paragraphs in the Rule Book, under the heading, Rule 1507, "On Engine, Cars or Trains" prohibiting all trainmen generally from (1) hanging on car door; (2) standing between one car and lumber or pipe on another car; (3) sitting or standing on side of roof of box car; (4) sitting on runningboard of tank or flat cars; (5) jumping from roof of closed car to open top car; (6) throwing refuse from moving trains.

Thus the "lookout" paragraph, which is number 7 in this list under rule 1507, obviously does not place sole responsibility on any one member of the crew.

Petitioner, as conductor, was in charge of the movement into the Mallory plant. He got his orders, copies of which were given to the engineer, from the Yardmaster, who was his superior. He was given a switching list which was the order to spot a loaded car of coal in the Mallory plant (R. 108). His duties in the Mallory plant that day were to do what was necessary to execute that order.

The track and right of way in the Mallory plant over which the crew on Job 12B must travel into the plant was always, and was on July 18, 1945 piled with oil drums, machinery, cylinder, steel, and everything that comes out of the Mallory plant (R. 93, 97, 115, 126).

Petitioner and others had, prior to the date of the accident, often complained about this condition to the Mallory people and to one Bergman, Safety Director of the Pennsylvania, and to that Respondent's Yardmaster, Sennett (R. 94, 132), but nothing had been done about the condition by either Respondent.

When the crew arrived at the gate of the Mallory Company on July 18, 1945, the train was stopped there. The policeman or guard on duty there opened the gate. His name was Larry Turner. Petitioner entered the Mallory premises, saw the stuff, including the oil barrels, on the track, and ordered Turner to move them off so the train could come in and spot the coal car. He then walked to the end of the tracks to the north to see that the rest of the track was clear (R. 94, 96, 123, 126).

The engineer and other members of the crew, after the stuff was moved from the track, brought the train into the plant and up to the north end where the Petitioner was and

picked up an empty coal car that had to be removed before the loaded car could be spotted. Petitioner rode back to Moore Avenue between the loaded and the empty cars (R. 96).

While the other members of the crew were setting out the empty car over in the Pennsylvania yards, Petitioner, in compliance with Rule 103a, guarded the Moore Avenue crossing to prevent injury to Mallory employees who crossed there to get to the commissary. At the same time he kept the trucks from backing on the track to get to the loading platform, and from blocking the train coming back up the track (R. 95, 96, 97, 158). Petitioner testified (R. 158-159):

> "When I was guarding this crossing at Moore Avenue, and the train was crossing from (with) our engine, a car was coming from the South. I was watching that train and engine coming, coming along there from the South, to see nobody got (ran) into it, or nobody got run over or hit.
>
> "I was facing East and South, and these oil drums were north of me.
>
> • • •
>
> "At the time I stepped on that sill step, I was standing about four feet from the loading pit, and at that time these drums I talk about were to the left.
>
> "I know they had been there. I had ordered them moved.
>
> "There was something there to obstruct my seeing them there. I was watching the traffic in the different directions.
>
> "There was nothing between me and the drums.
>
> "The traffic from the other direction prevented me from looking to the left at the time."

It was about twenty minutes from the time petitioner ordered Turner to remove the barrels and stuff from the track till the accident happened (R. 132). The train had twice traveled over the track after the barrels were

removed. As the leading car, the coal car, passed over Moore Avenue on its third trip over the track, Petitioner caught the ladder on the leading Northwest corner, so as to be in position to spot the car at the unloading point. He immediately saw the barrels, tried to swing around the corner of the car to avoid them, but his right leg was caught between one or more of the barrels and the car and injured (R. 99, 100).

Petitioner was the only witness that testified in connection with the merits of the case. Neither Respondent called any fact witness at the trial and there is no explanation as to why Bergman, the safety director; Sennett, the yardmaster; or Turner or some other representative of Mallory, was not called by the Respondents.

VI.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Appellate Court of Illinois, First District, erred:

1. In holding that the Petitioner and not the Respondents had the duty of making his place of work a safe place in which to perform his duties;

2. In failing to base its judgment upon all of the evidence in the record;

3. In substituting its judgment for that of the jury as to the cause of the accident and injury to the Petitioner and in finding that Pennsylvania was not negligent and that Petitioner, himself, was guilty of such negligence as to bar his action against Mallory;

4. In depriving Petitioner of the benefits as an employee under the Federal Employers' Liability Act and of the verdict of the jury;

5. In reversing the judgment of the Superior Court of Cook County.

VII.

ARGUMENT.

A.

The Appellate Court erred in holding that the Trial Court should have directed the verdict requested in favor of Respondents and in reversing the judgment of that Court.

The gist of the petitioner's cause of action against the Respondents as stated in the Complaint is:

1. As to the Pennsylvania (R. 45):

The defendant, The Pennsylvania Railroad Company, was careless and negligent in failing to use ordinary care to provide the plaintiff with a reasonably safe place in which to work.

2. As to the Mallory Company (R. 47):

Defendant, P. R. Mallory and Co., Inc., was careless and negligent in failing to use ordinary care to provide the plaintiff, as their invitee, with a reasonably safe place to work.

The evidence supporting these allegations of the Complaint may be summarized as follows:

1. Petitioner and his fellow crew members were directed by Pennsylvania's Yardmaster to deliver a car of coal billed to the Mallory Company. This necessitated the removal of an empty coal car standing at the point in the Mallory Plant where the car loaded with coal was to be spotted for unloading by Mallory.

2. When petitioner and the other crewmen reached the Mallory plant with the train, Mallory's gate man opened

the gate through which the train must pass to reach the delivery point.

Petitioner entered the plant ahead of the train, saw the oil barrels and other material on the track over which the train must proceed. He ordered the gate man to move or cause the barrels and other material on the track to be removed so the train could reach the delivery point.

Petitioner then proceeded along the track to the delivery point where the empty car was standing to see that that part of the track was clear.

3. When the track was cleared the other crewmen brought the train over the track to the delivery point and petitioner saw that the coupling between the empty and loaded coal cars was made. He rode between these two cars back to Moore Avenue.

4. Petitioner then watched the crossing to prevent injury to cars or trucks and persons passing along Moore Avenue over the tracks and to prevent trucks from backing up over the track to the platform and blocking the track. He performed these duties and gave no further attention to the barrels, since the train had passed twice over the point from which the barrels had been removed.

5. The condition of the Mallory premises on and in the vicinity of the track, as found by Petitioner upon entering the plant ahead of the train that day, was not unusual. It was always that way, piled with barrels, machinery and other stuff that came out of the plant. Petitioner and other crewmen had on previous occasions complained about it to Mallory and to the Safety director and Yardmaster of the Pennsylvania and had requested that the dangerous condition be remedied.

6. When the train returned from setting out the empty car over in the Pennsylvania Yards, Petitioner swung

onto the leading northwest corner of the loaded coal car as it passed him to be in position to spot the car at the delivery point.

7. The barrels or one or more of them had not been moved by Mallory's man far enough to clear a man riding as petitioner was on the side ladder of the loaded car. Petitioner could assume that the barrels had been moved from the track since the train had made two trips over it subsequent to his order for their removal. He evidently thought no more about the barrels for that reason and for the further reason that he was busy keeping trucks off the track and watching the crossing at Moore Avenue.

Furthermore he could assume, under the lookout rule, that if the barrels were still in dangerous proximity to the track, the engineer, fireman, or some other member of the crew would have noticed it in the two previous trips over the track and would have moved or caused them to be moved to a safe distance or would have reported to him about the close clearance.

8. The barrel or barrels that injured Petitioner were still a part of the general mass of barrels and other material on the track that had been placed and left there by Mallory and which made up the general continuing condition about which complaints had been made to both Respondents on previous occasions and requests made that the dangerous condition be removed.

9. These facts are undisputed. Petitioner was the only fact witness at the trial. Respondents produced no fact witnesses, though other members of petitioner's crew and Mallory's men were available. No explanation was made as to why they were not called.

10. There is no evidence tending to show that petitioner failed to perform any duty imposed upon him by the rules

of his employer or any duty required of him by his orders under which he was sent into the Mallory plant.

The law applicable to these facts and the charges in the complaint:

1. As to Pennsylvania:

(a) *Bailey* v. *Central Vt. R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 1064:

> "At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. (authorities) That rule is deeply engrained in federal jurisprudence. (authorities). As stated by this court in the *Patton* case it is a duty which vecomes 'more imperative' as the risk increases. Reasonable care becomes, then, a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery, (authorities). That duty of the carrier is a 'continuing one' (authorities) from which the carrier is not relieved by the fact that the employees' work at the place in question is fleeting or infrequent."

(b) *Divine* v. *Delano*, 272 Ill. 166, 176, 111 N. E. 742:

> "It is undoubtedly true that many duties required of employees in the work of a railroad company are attended with danger, and can only be carried on by means that are hazardous and dangerous to those who enter into such employment. Where no necessity, however, exists for the operation of such railroad under dangerous conditions and where it only requires care and skill to make such conditions safe, 'there is no reason why an employee should be subjected to dangers wholly unnecessary to the proper operation of the business of the employer. (*Choctaw etc. Railroad Co.* v. *McDade*, 191 U. S. 64.) Plaintiffs in error were not required by law to operate these switch tracks in the yard of this manufacturing plant under conditions dangerous to their employees if it was practicable and feasible for such dangerous conditions to be removed. If the railroad company had no such control as to be

> able to remove such dangerous conditions itself it could require the owners of the plant to change these conditions, or refuse until such change, to do such switching."

There is no defense of contributory negligence as a bar to the action or assumption of risk open to Pennsylvania. 45 U. S. C. A. Sect. 53, 54. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63, Set. 444.

2. As to Mallory:

National Builders Bank v. *Schuham*, 319 Ill. App. 546, 552, 49 N. E. (2nd) 825:

> "All the authorities agree that it is incumbent upon the owner of premises upon which persons come by invitation, express or implied, to maintain such premises in a reasonably safe condition for the contemplated uses thereof for which the invitation was extended."

The questions to be decided in this case, both in the trial and Appellate Court, were (a) whether these duties, respectively, of the two Respondents had been kept, (b) whether, if not kept, Petitioner's injuries were the result of the failure to keep them and as to Mallory (c) whether Petitioner was in the exercise of ordinary care for his own safety.

These questions, which were preeminently for the jury, were, by the verdict, decided in favor of the Petitioner.

(a)

Petitioner was not the Alter Ego of Pennsylvania.

Questions (a)and (b) were not considered by the Appellate Court in its opinion. That Court adopted the astounding theory that Petitioner and not the Respondents had the duty to make the premises safe:

The Appellate Court says:

"It does not appear that the railroad company had any duty to maintain the premises in question which was owned and maintained by the defendant Mallory Company. The only theory upon which the railroad company could be charged with failing to use reasonable care in affording plaintiff a safe place to work was in the failure to keep the track clear of impedimenta. At the time and place of this accident, according to his own testimony *plaintiff himself was the agent of the railroad company* charged with the duty of keeping this spur track clear for the safe movement of his train. Under such circumstances, this became a safe or an unsafe place to work according to whether or not plaintiff performed or failed to perform his duties. (Italics ours.)

* * *

"We are of the opinion that the plaintiff should not claim damages for injuries resulting from a dangerous condition which, by omission to do his duty, he himself creates.

* * *

"We are of the opinion that even though the other members of the crew might have determined the presence of a dangerous instrumentality adjacent to the tracks, that they were not required, in the exercise of ordinary care, to, anticipate that the plaintiff would thrust himself into such a position of danger."

In discussing the Mallory Company phase of the case, the Court says:

"In the instant case the facts are not disputed. They have been fully reviewed here. Plaintiff admits that although he was standing only ten or twelve feet from this position of danger and although he had a duty to maintain a lookout in the direction his train was moving, that he did not look before boarding the train to see whether the barrels were on or off the track and that he paid no attention to the barrels before he got on the train, *although he had previously had warning that the barrels were so close to the track as to prevent clearance.*"

Thus the Court fails to consider the case presented by the evidence.

For the reason that Petitioner was the conductor in charge of the movement, the Court recasts him in a character which is the composite of the Pennsylvania and Mallory; ignores the duties he was sent into the plant to perform for the benefit of both Respondents and clothes him with the sole duty of cleaning up the Mallory premises.

The conclusion reached on this narrow and erroneous view of the case could be reached only in a case where an employee is directed to go into a dangerous place for the very purpose of making that place safe. If that were the case here, the decision of the Appellate Court might be defended. But that is not this case.

Here Petitioner was not sent into the Mallory plant to clean up the track on the Mallory premises, so as to make it safe for the Pennsylvania to send its employees upon them to further its business with the Mallory Company. His sole duty there was to complete a business transaction between the two companies by delivering a car of coal, not as an agent of Pennsylvania, but as one of its employees. He performed that duty in the usual an customary manner, as well as all the duties required of him as an employee, including the duty to use ordinary care for his own safety in the circumstances in which the evidence shows those duties were required to be performed.

As conductor, petitioner was of course in charge of the movement. But he was just an employee along with the other members of his crew. He was hired by Pennsylvania just as other members of the crew were hired. He was promoted to conductor, but this could not work a change in his employer's duties toward him and did not change his original contract of employment or make him an agent

of his employer to perform functions unrelated to his duties as an employee.

The duties of every member of the crew, including the Petitioner, were fixed by the nature of their mission and by the rules promulgated by their common employer.

Petitioner and the engineer were jointly responsible for the safety of the train. The other crewmen were required to render assistance in this respect. Everyone was required to keep a lookout to the end that the train could enter and leave the plant in safety. One of the purposes in having five crewmen on such a movement is that where one crewman, for any reason, overlooks something that threatens the safety of the train, there will be four other men, one or more of whom, may discover the danger.

The Appellate Court had these rules before it but chose to take and misconstrue Petitioner's statements at the trial that he was in charge of train and was responsible for its safety, into an assertion that he was responsible for making the premises safe.

There is no question but that had anything happened to the train itself, Petitioner, as the superior crewman, in that respect, might have had the ultimate responsibility. But ultimate responsibility for the safety of the train is one thing, responsibility for the safety of the place in which he and the other crewmen were required to perform their duties, as employees of the railroad and as invitees of the Mallory Company, is an entirely different thing. That was the responsibility of the two Respondents.

Petitioner in his testimony, singled out and relied upon by the Court in deciding the case against him, was talking about his responsibility in the first sense and not in the second sense of being responsible for the safety of the place of work. Even had he, under the insistent cross

examination of the two lawyers for the Respondents, made such a claim of responsibility, the Court would be required to rely upon the true fact, if it appears from the evidence, and not upon some wild expression elicited from a witness on cross examination by lawyers, out to destroy damaging testimony. But he made no such claim. In any event the true facts as to Petitioner's duties and responsibilities as well as that of the Respondents were in evidence.

(b)

The evidence justified the submission of the case to the jury and was such as to require the Appellate Court to abide by the verdict.

The province of the Court, in connection with the questions here presented, whether it is a trial court or a court of review, is so well established as to need no citation of authorities. However, the following authorities may be cited:

Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32:

> Petitioner was required to present probative facts from which negligence and the causal relation could be reasonably inferred The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. *Galloway* v. *United States*, 319 U. S. 372, 395; *Atchison T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of twelve persons.

Lavender v. *Kurn*, 327 U. S. 640, 653:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded

men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.

Merlo v. *Public Service Co.,* 381 Ill. 300, 311, 45 N. E. (2nd) 665:

> The Civil Practice Act and Rule 22 of this court require the court to be governed by the same rules in passing upon a motion for judgment notwithstanding the verdict as govern it in passing upon a motion for a directed verdict. The power of the court is the same in both cases, the reason being that the motions are, in effect, the same. These motions present only a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the plaintiffs' case.

Lasco v. *Meier,* 394 Ill. 71, 67 N. E. (2nd) 162, 167:

> "Appellant further contends that the court erred in not directing a verdict in his favor, for the reason, as he says, that the plaintiff was guilty of contributory negligence as a matter of law, in failing to warn the driver of the approach of the other automobile. The question whether a plaintiff has been guilty of contributory negligence is ordinarily and preeminently a question of fact, upon which he is entitled to have the finding of a jury. It can become a question of law only when, from the undisputed facts, all reasonable minds, in the exercise of a fair and honest judgment, would be compelled to reach the conclusion that there was contributory negligence."

Moffit v. *O. L. D. Forwarding Co.,* 331 Ill. App. 278, 73 N. E. (2nd) 164, 167:

> "The question of contributory negligence is preeminently for the consideration of the jury, as such negligence cannot be defined in exact terms, and unless

it can be said that the action of the injured person is clearly and palpably negligent it is not within the province of the court to substitute its judgment for that of the jury. *Blumb* v. *Getz,* 366 Ill. 273, 277, 8 N. E. 2d 620. Before the question of contributory negligence can be said to be established as a matter of law, the conduct of the injured party must have been so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent. *Hellwig* v. *Lomelino,* 309 Ill. App. 369, 375, 33 N. E. 2d 174."

Malone v. *Suburban Transit Co.,* 64 F. Supp. 859, 863:

"Where the nature and attributes of an act relied on to show negligence contributing to an injury sustained as a proximate cause thereof, can only be determined correctly by considering all the attending and surrounding circumstances of the accident it falls within the province of the jury to pass upon and characterize it and it is not for me to determine its quality as a matter of law."

The Appellate Court adopted defense counsel's theory of the case. That theory was presented to the jury along with petitioner's theory. The jury adopted petitioner's theory which is based upon all of the facts and circumstances in evidence. This fact, after the jury has returned its verdict, does away with the "all reasonable and unbiased minds" rule and substitutes for it the rule that if there is a reasonable basis in the evidence for the jury's verdict, that verdict must stand.

In *Ellis* v. *Union Pac. R. Co.,* 329 U. S. 749, 67 S. Ct. 598, this Court says (page 600):

"The choice of conflicting versions of the way the accident happened, the decisions as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. *Tenant* v. *Peoria & P. U. R. Co.,* 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Lavender* v. *Kurn, supra.* Once there is a reasonable basis in

the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender* v. *Kurn, supra,* 327 U. S. at page 652, 66 St. Ct. at page 743. And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. *Washington & Georgetown R. Co.* v. *McDade,* 135 U. S. 554, 472, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 68, 63 S. Ct. 444, 451, 87 Ld. Ed. 610, 143 A. L. R. 967.

"We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned."

The Appellate Court had these established principles before it. But the Court adopted the farfetched theory that Petitioner was the Pennsylvania Railroad (R. 190) and relied upon authorities decided upon facts and circumstances wholly different from those in the case before it.

The Court, on the Pennsylvania phase of the case relied upon cases, plainly distinguishable on their face.

In *Hylton* v. *Southern Railway Co.,* 87 F. (2nd) 393, 395, Hylton disobeyed a positive order to watch for a steel gang ahead of him laying rails and voluntarily released the brakes on a grade resulting in the derailment of the train and his consequent death.

The case was decided prior to the 1939 amendment removing assumption of risk from these cases [7] and the court held that he assumed the risk of injury resulting from the method of operating the train down grade without turning up retainer valves.

There is no contention or evidence in this case that petitioner violated any positive order and it cannot be

[7] *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 63 S. Ct. 444.

said, in the circumstances of this case in the face of the jury's verdict to the contrary, that he violated the general safety rule requiring all crew men to look out for structures along the track.

In *Eckenrode* v. *Pennsylvania R. Co.*, 71 F. Supp. 764, 768, Eckenrode put his head into the driving wheels of the engine in a voluntary attempt to put sand on the rails, to keep the wheels from slipping. His head was crushed, causing his death. Obviously, there is no similarity of fact or circumstance between that case and the case at bar. The judgment in the case was affirmed by the United States Court of Appeals and that court's judgment was affirmed by this Court in a recent decision in the case.[8]

In *Davis* v. *Hand,* 290 F. 73, the dangerous clearance of the obstruction involved was obvious and known to the plaintiff. He gave the signal to the engineer to move ahead and unnecessarily took a dangerous, instead of several safe positions open to him. The case was decided in 1923, long before the 1939 amendment, when as stated by Mr. Justice Black in the *Tiller* case, assumption of risk was often applied under the name of contributory negligence. The case is very similar in many respects to *Ellis* v. *Union Pac. R. Co.,* 329 U. S. 749, 67 S. Ct. 598, cited above, where this Court came to a different conclusion.

In any event the case can have no bearing in the case at bar.

Pennsylvania could not delegate its duty to furnish petitioner a safe place to work any more than could the court shift the burden of its duty to Petitioner.

The rule in Illinois is, as stated in *Porter* v. *Terminal R. Assn. of St. Louis,* 327 Ill. App. 645, 65 N. E. (2nd) 31, 33:

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[8] *Eckenrode* v. *Penn. R. Co.,* 164 F. (2d) 996, 335 U. S. 329, 69 S. Ct. 91.

> "It is the duty of the Master to furnish the servant with a reasonably safe place to work. * * * and this duty follows the Master even though the servant is sent upon the premises of another to do his work. This duty is non-delegable and affirmative, and must be continuously fulfilled and positively performed."

Among the numerous authorities cited by the Court in support of this statement of the rule are: Shearman and Redfield on Negligence, Rev. Ed., Vol. 2, Secs. 193 *et seq.*, and *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 63 Sct. 1062, 87 L. Ed. 1444. See also *Divine* v. *Delano*, 272 Ill. 166, 176.

The undisputed and uncontradicted evidence in this case establishes beyond question that Pennsylvania violated this duty and was guilty of negligence.

In the Mallory phase of the case the Court cites *Illinois Central R. R. Co.* v. *Oswald*, 338 Ill. 270, where plaintiff drove her automobile across a bridge into a volume of dense black smoke and was struck by another car while the smoke blocked the view. She then left her car and got out into the smoke to see what caused the accident and was struck by a third car. Clearly, the case is not authority here.

Prill v. *City of Chicago*, 317 Ill. App. 202 and *Keele* v. *Atchison, T. & S. F. Ry. Co.*, 258 Mo. 62 (167 S. W. 433), cited by the Court state correct principles of law, but it is well settled law that whether the principles announced in one case apply in any other case, depends upon the facts and circumstances of each case. The cases are not applicable here.

The Court does not cite any recent case or any case that could sustain its position here that the Petitioner and not the Respondents had the duty of making the place of work where Petitioner and his fellow crew members were re-

quired to perform their duties in furthering the business interests of both of these Respondents, a reasonable safe place.

(c)

The Court, thus, on a wholly erroneous theory deprived Petitioner of the benefits of the jury's verdict and of his constitutional right to have his case tried by a jury.

Conclusion.

The device or theory adopted by the Appellate Court of Illinois to overturn the verdict and judgment of the Superior Court of Cook County ignores the probative evidence in the record and the law applicable to that evidence. The Court's failure to consider the evidence and the applicable law, led to the result that Pennsylvania was not guilty of any negligence and that Petitioner was guilty of contributory negligence. Only upon this narrow and ironious view of the case could the Court reach its conclusion that the trial court should have directed a verdict as to both Respondents.

For these reasons, Petitioner urges that the writ prayed for in the Petition be granted; that the judgment of the Appellate Court of Illinois, First District, be reviewed and reversed by this Court and that the judgment of the Superior Court of Cook County be affirmed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 130*

ALVIE D. KILLIAN,

Petitioner,

VS.

THE PENNSYLVANIA RAILROAD COMPANY and P. R. MALLORY & CO., Inc.

Respondents.

PETITIONER'S ANSWER TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI.

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*Formerly No. 876, October Term, 1948.

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STATEMENT.

Both respondents have filed briefs during the court's recess in opposition to the petition for a writ of certiorari. This reply is presented for filing under Rule 38, Paragraphs 3(a) and 4(a).

*Formerly No. 876, October Term, 1948.

I.

Pennsylvania's brief does not deal with the case presented by the petition and supporting brief.

Pennsylvania, in its brief, does not pretend to answer the petition and supporting brief or the case made by the record. It completely sidesteps the questions raised by the action of the Appellate Court of Illinois in stating the facts differently from the facts in the record, as passed upon by the jury in returning its verdict in favor of petitioner and by the trial court in refusing to allow the motion for a new trial and in proceeding to base its decision in the case upon the facts as restated.

The result is that Pennsylvania, as did the Appellate Court, is talking about an entirely different case than is presented by the record. The case of *Beamer* v. *Virginian Ry. Co.*, 181 Va. 650, 26 E. (2nd) 43, (certiorari denied, 321 U. S. 763), cited in its brief, footnote at Page 11, is a good illustration of this fact.

In that case Beamer was employed by the railroad at its electric generating plant at Narrows, Virginia. The plant had been designed and constructed by a New York firm of engineers, Gibbs and Hill. Beamer was originally employed by this firm as a steamfitter in the construction of the plant. When the plant was completed, he was taken over by the railroad to work for it at the new plant in the same capacity. At the time of his death out of which the suit arose, he had been employed by the railroad in that capacity for fifteen years. His services had been satisfactory and he was more familiar with the system of pipes in the plant than any other employee.

The day before the accident, Turbine No. 1 at the plant was not functioning properly. The general foreman di-

rected Beamer to inspect it, discover and remedy the trouble. He was employed to do this type of work.

Beamer found the trouble in the heater line. A large expansion joint in that line running to the turbine was broken. Beamer reported this to the foreman and gave reasons why the joint should be replaced with a new part, rather than to attempt to repair it. The foreman directed him to replace it with a new joint which he proceeded to do on the following day.

The place where Beamer and his helper must work in replacing the joint was very hot. An hour after his death it was found to be 132 degrees F. There was a natural and normal accumulation of dust on the pipes.

An air hose was available for Beamer's use for any needed purpose and particularly to create a better circulation of air to cool him and his helper. He did not use it for the reason that it would stir up the dust and render the air unfit to breathe. That, of course, was his decision.

The work required two hours and a half. After finishing the work, Beamer sat outside to cool off for a while and then walked a short distance into the machine shop where he collapsed and died.

There, as here, the gist of the action was failure to provide a reasonably safe place to work.

There was no evidence that anyone except Beamer and perhaps his helper knew or had any occasion to know anything more about the place where the joint was to be repaired than that it was hot.

There was a verdict for the plaintiff for $10,000.00 which on motion was set aside by the trial court and judgment entered for the defendant. The case went to the Supreme Court of Virginia.

The case is a fairly good example of where an employee competent for the purpose, is sent into a dangerous place to make repairs. Beamer and Beamer alone was qualified to inspect the place and to determine whether or not it was safe and to render it as safe as such a place could be made. There was nothing wrong with the construction of the plant or with the method of operation. He was furnished a hose to reduce the heat so as to meet, in part at least, the only hazard that was known or could have been known to his superiors. The necessity for the repairs that he was ordered to make furnished the only occasion for learning about the natural and normal accumulation of dust on the pipes. It was for him to determine whether he would first use the air hose to blow the dust away and then use the air to cool the temperature. The place of work was, therefore, safe or unsafe, according to his own judgment of how best to proceed to make the replacement of the broken expansion joint.

The Virginia Supreme Court, on these facts, affirmed the judgment of the trial court in setting aside the verdict.

Beamer is the type of case stated and decided by the Appellate Court. It is the type of case stated and argued here by Pennsylvania, but it is not the type of case presented by the record.

The jury and the trial court in the case at bar reached a verdict and judgment on the basis of a group of operative facts that made a case entirely different from the *Beamer* case.

In the case made by the record the duty of making the place safe rested upon the respondents who had timely warning. The Appellate Court, by ignoring the vital facts, selected and stated a group of operative facts that was entirely different from that revealed by the record and

proceeded to pass upon the facts as restated and to come to a different conclusion than that reached by the jury and the trial court.

It is to invoke this Court's power of revision and correction of such action by a state court that we have presented the petition in this case. Pennsylvania has not answered the petition.

II.

Jurisdiction as to Mallory.

Mallory, in its brief, does not answer the petition on the merits of the case. It challenges the jurisdiction of the Court insofar as it is concerned and moves to dismiss as to it.

Petitioner, in his petition and supporting brief, invokes the jurisdiction of the Court under Title 28, United States Code, Judiciary and Judicial Procedure, Section 1257, Paragraph 3. Jurisdiction is placed upon the grounds that the judgment to be reviewed is a decision involving rights, privileges and immunities specially set up or claimed by petitioner under a United States Statute, The Federal Employers' Liability Act (Petition 4, Brief 9).

We made no separate jurisdictional claim insofar as Mallory is concerned. Under settled rules announced by the Court over the long period of its history, we deemed it unnecessary to assume that a motion to dismiss would be made by this respondent on jurisdictional grounds, since there is a substantial federal question in the case. Until such motion was made, such a statement, we believe, was not essential.

The reasons advanced for the contention that "this Court lacks jurisdiction of *this cause* so far as this re-

spondent is concerned" (Mallory Brief, Page 1, Italics ours), might have merit had this suit been filed against Mallory alone. We concede also, that jurisdiction, as to this respondent, is not invoked by the mere joinder of Mallory as a party defendant with Pennslyvania, which is subject to the provision of a federal statute. "*This cause,*" as correctly used in the above quoted language from the brief, is the key to the problem.

The Illinois Statutes provide[1]:

> "Any person may be made a defendant * * * against whom a liability is asserted either jointly, severally or in the alternative arising out of the same transaction or series of transactions regardless of the number of causes of action joined."

The Illinois Statutes further provide as to the pleadings[2]:

> "(2) Each separate claim or cause of action upon which a separate recovery might be had, shall be stated in a separate count or counterclaim, as the case may be, and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be, a separate allegation."

Illinois Supreme Court Rules provide as to pleading of law matters[3]:

> "Different breaches of a contract, bond or other obligation, and different breaches of duty, whether statutory or at common law, or both, growing out of the same transaction, or based on the same set of facts, may be treated as a single claim or cause of action, and set up in the same count."

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[1] Civil Practice Act, Sec. 24, Smith-Hurd Illinois Annotated Statutes, Ch. 110, Sec. 148, Sub-section 1.
[2] Civil Pract Act, Sec. 33, Smith-Hurd Illinois Annotated Statutes, Ch. 110, Sec. 157, Sub-section 2.
[3] Supreme Court Rule 12, Smith-Hurd Illinois Annotated Statutes, Ch. 110, Sec. 259.12.

Pennsylvania is sued here under the Federal Employers' Liability Act (R. 42). That respondent admits in its answer that both petitioner, its employee, and respondent were at the time of the accident engaged in Interstate Commerce and that both were subject to the provisions of the Federal Employers' Liability Act (R. 49).

Plaintiff resides in Indianapolis, Indiana (R. 92). Mallory is a Delaware corporation, authorized to do business in Illinois; has a registered agent at 33 North LaSalle Street, Chicago, Illinois, which was served with process and is sued at Common Law (R. 42, 43). This respondent could have been sued in a federal court on diversity grounds.

The complaint is in one count. After alleging the facts setting forth the cause of action, it is further alleged (R. 44-45):

> "Defendants, at the time and place set forth, wholly regardless of their duty toward the plaintiff, were guilty of the following joint and several acts and omissions, in one or more particulars, which concurred and combined to cause the accident and injury to the plaintiff."

Then follows (R. 45-47) allegations of specific breaches of duty, the gist of which is that Pennsylvania failed to provide a reasonably safe place to work and Mallory failed to maintain its premises in a manner to make the same reasonably safe for plaintiff, an invitee, to perform the duties required of him there.

It is then alleged (R. 47) that, as a direct and proximate result of one or more of the foregoing acts of negligence, the plaintiff was injured.

The foregoing provisions of the Illinois Statutes and the facts constituting the cause of action, as set forth in

the complaint, together with the evidence in the record form the basis for deciding the jurisdictional question raised by Mallory.

There is a definite and substantial federal question involved. This gives the Court jurisdiction of the case. A federal court having acquired jurisdiction by reason of a substantial federal question involved, has the right to decide all questions in the case, even though it decided the federal questions adversely to the party raising them or even if it omitted to decide them at all, but decided the case on local or state issues only.[4]

This Court has that right.[5]

The rule has been limited by this Court as follows[6]:

> "But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground; in the latter it may not do so upon the nonfederal cause of action."

Under all of the tests used by the courts and law writers to determine whether there is but a single cause of action involved or whether two or more separate and distinct causes are presented, the case at bar involves but a single

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[4] *Hillsborough T. P. v. Cromwell*, 326 U. S. 620, 66 SCt. 445, 451 and cases there cited.

[5] *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 191.

[6] *Hurn, et al. v. Oursley*, 289 U. S. 338, 245-246, 53 SCt. 586, 589.

cause of action and falls within the requirement of the rule as above quoted.

The facts forming the basis upon which petitioner claims relief in this case constitutes a single transaction or occurrence; there is but one group of facts revealing but a single wrong and a single indivisible injury to the petitioner for which he may have but one recovery. While he exercised his right to sue his employer under the federal statute and Mallory at the common law, liability of both respondents is to be determined under the general rule defining negligence as the lack of care under the circumstances.[7] There is but one single group of operative facts. It is, therefore, not possible to separate these intertwined facts, or the common questions of both fact and law into two causes of action, whether the historical test, or the test adopted by courts and law writers under the Codes, which have put an end to the era of writs and remedies, is applied[8].

Mallory does not contend that there is more than one cause of action here. It merely says (Mallory Brief 7-8) that the judgment or the questions, as between Pennsylvania and Mallory, are severable.

Petitioner asked for a single judgment "against the defendants, or either of them." (R. 48.)

The jury returned its verdict, finding the defendants, Pennsylvania and Mallory, guilty, and assessed petitioner's damages at the sum of $10,000.00 (R. 66). Judgment was entered on this verdict that the plaintiff recover from Pennsylvania and Mallory the sum of $10,000.00 (R. 67).

There is no rule of law giving to this verdict and judgment any quality of severability.

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[7] *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 Sct. 444, at page 451.

[8] *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 53 SCt. 278, at page 280; Clark, On Code Pleading, 2nd Ed., Pages 127-148.

To say that the questions presented by several parties "as they are in this case" are severable, is without any significance. The applicable rule assumes that there will be questions in a case of this kind, some referable to local law and some to federal law.

It is said (Mallory Brief 7) that jurisdiction as to one party does not impart jurisdiction as to the other party.

The applicable rule contemplates jurisdiction of the case and of course of the parties by reason of the ingredient furnished by a substantial federal question. Such jurisdiction gives the Court the right to decide all of the questions in the case, whether of a local or federal nature. The mere fact that on this account the questions may be distinct or different or severable is not material.

Mallory, at page 8 of its brief, cites *James-Dickinson Farm Mortgage Co.* v. *Harry,* 273 U. S. 119, in support of its theory of severable judgments and severable questions.

In that case, suit was brought in an Illinois state court against Dickinson an individual and the James-Dickinson Company a corporation. By reason of diversity of citizenship, the cause was removed to a federal court.

Service was properly had upon Dickinson individually. Service was had upon the corporation by serving Dickinson as its president, while he was temporarily in the State of Illinois on business of the company. The company challenged the jurisdiction of the Court, as to it, on the ground of improper service of process. Its objections were overruled and it pleaded to the merits.

The plaintiff got a verdict and judgment. Because of a claim that rights guaranteed by the Fourteenth Amendment had been denied the defendants, a direct writ of error was allowed under Section 238 of the Judicial Code then in force.

The Court said (Page 121):

> "In the course of the trial, a multitude of requests for rulings made by the defendants, were denied. Many other rulings to which they objected were given. Exceptions were duly taken. As the case is properly here on constitutional grounds, the jurisdiction of this Court extends to a review of all questions. *Chaloner* v. *Sherman*, 242 U. S. 455, 457. All have been considered. Only a few require discussion."

The Court proceeded to consider the question of the company's objection to the jurisdiction on the grounds of improper service and said (Page 122):

> "* * * The objection to the jurisdiction over the corporation should have been sustained. As it was not waived by the later proceeding in the case, the judgment against this defendant is reversed with directions to dismiss the action as to it. This reversal does not require that the judgment be reversed also as to Dickinson. * * *"

Thus it is made clear that the state court where the suit was filed never acquired jurisdiction of the company and since the state court lacked jurisdiction, the federal court to which the case was removed never acquired jurisdiction. There was, therefore, no question of jurisdiction over the company in this Court, but the Court having jurisdiction of the case by reason of the federal question, proceeded to decide all of the questions in the case, including the one of improper service.

Moreover, it was not a question of the judgment becoming severable in this Court or of the questions in the case being severable as between the parties. Since the lower federal and state courts lacked jurisdiction of the company, there was no valid judgment, at all, insofar as it was concerned. Since the judgment was valid as to Dickinson, the lower court was reversed on its ruling on the question

of improper service on the company and the judgment was affirmed as to Dickinson.

We respectfully submit that Mallory's motion to dismiss as to it, should be overruled and the case disposed of on its merits as to both respondents.

Respectfully submitted,

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JUL 8 1949

CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 130*

ALVIE D. KILLIAN,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY and P. R. MALLOBY & CO., Inc.,

Respondents.

BRIEF OF RESPONDENT, PENNSYLVANIA RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT, PENNSYLVANIA RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF COURT BELOW.

The opinion of the Illinois Appellate Court is published in Abstract form only in the official reports: *Killian* v. *Pennsylvania Railroad Co., et al.*, 336 Ill. App. 152, 82 N. E. (2d) 834.* The petition of petitioner for leave to appeal to the Illinois Supreme Court was denied on March 22, 1949, without an opinion.

* The full text of the opinion of the Appellate Court appears in the record. (R. 1-13 both inclusive.)

II.

JURISDICTION.

This respondent submits that this court should not assume jurisdiction for the reason that the decision of the Appellate Court is in accord with the applicable decisions of this court.

III.

QUESTIONS PRESENTED.

It is suggested that the ultimate questions for determination are:

(a) Was the judgment of the appellate court correct in finding that the petitioner failed to establish negligence on the part of this respondent which proximately contributed in whole or in part to his injuries?

(b) Was the judgment of the appellate court correct in finding in substance that the conduct of the petitioner was the sole proximate cause of his injuries?

(c) Did the appellate court err in holding that the trial court should have directed a verdict for the respondents?

(d) Is the decision of the appellate court construing the provisions of the Federal Employers' Liability Act (45 U. S. C. A. 51-60), probably contrary to the applicable decisions of this court?

IV.

SUMMARY OF ARGUMENT.

A.

The Appellate Court correctly found that petitioner's evidence failed to establish any negligence on the part of this respondent.

1.

There was no evidence tending to establish negligence on the part of this respondent, in that it failed to perform any duty it owed to the petitioner to furnish him with a reasonably safe place to work.

2.

The failure of the members of the crew to warn petitioner of the danger of which he was fully aware did not constitute negligence, on the part of this respondent. There was no evidence, tending to establish that the members of the crew knew of the danger, or could have anticipated that the petitioner would leave a place of safety and go into a position of danger.

B.

The Appellate court did not err in holding that the trial court should have directed a verdict for the respondents, because there was insufficient evidence of negligence to submit that question to the jury.

C.

Petitioner's injuries solely and proximately resulted from his violation of well known rules of the respondent which it was his duty as conductor in charge of the switching operation to enforce and himself obey.

V.

RESPONDENT'S ADDITIONAL STATEMENT OF FACTS.

The statement of facts of the petitioner (p. 13 of brief) does not contain all the facts which are material to the consideration of the questions presented to this court for determination. Material and highly relevant facts upon

which the appellate court based its opinion have been omitted or inaccurately stated.

The accident in question occurred on July 18, 1945 (R. 92), on the premises of the co-respondent, P. R. Mallory & Co. Inc., (see, respondent Pennsylvania Railroad's Exhibit No. 5—R. 169; ad. in evidence, R. 168).

This plant was located adjacent to this respondent's railroad yards, and was entirely enclosed by "a high cyclone iron fence" (R. 110).

The petitioner, a conductor in the employ of this respondent, had orders (R. 92) to remove an empty coal car from the Mallory premises, and to bring in and spot a car of coal (R. 94, 96). This switching operation was the first job on that day (R. 108).

The petitioner with his crew arrived at the Mallory plant at four o'clock in the afternoon (R. 94, 122). It was a clear day (R. 92, 83). It was broad daylight at the time of the accident (R. 123, 130), which occurred at 4:20 P. M. (R. 130).

The petitioner, as conductor of the crew was in charge of the switching operation (R. 108-110). The members of the crew were under him (R. 127). He testified that "there was no other representative of the railroad company in or about that industry at that time that superseded me" (R. 110).

The petitioner was familiar with the layout of the Mallory plant (R. 110). He had been on this particular job six days a week, for five or six weeks prior to the accident, and had gone in the plant every day (Rec. 93). He had worked in the plant prior to that time (R. 112).

When the petitioner arrived at the plant on the day of the accident, the policeman (Larry Turner, an employee of the Mallory Co. R. 123, 124) opened the gate to let the engine and cars into the plant (R. 94). It was the duty of the

petitioner according to his testimony to "see that everything was clear" (R. 94-96) and to "get everything clear for us to come in there with a car of coal, and get the empty" (R. 94). He also said it was his job "to see if the way was clear before he brought the cars in" (R. 125).

In performance of that duty he "went ahead" (R. 125) and walked down the track to Moore Avenue* (R. 115). (See, R. 96.) When he arrived at Moore Avenue "these barrels were on the track" (R. 115, 126). He got in touch with the policeman "and directed that they be moved" (R. 115). He then walked to the north end of the track and picked up the empty coal car. When the engine and two cars moved out, he rode between the empty and the loaded coal car (R. 115). As the cars moved across Moore Avenue he stepped off on the pavement (R. 127, 128, 116) on the east side of the track (R. 128). He stayed at Moore Avenue while the engine and two cars moved out of the Mallory plant and left the empty car in the Pennsylvania yard (R. 97, 129). When the engine returned pushing the loaded coal car he was on the west side of the track (R. 116). It was moving two or three miles per hour (R. 115). He was on the same side of the track "that the barrels were". There was nothing to obstruct his vision (R. 130). His eyesight was good. He did not wear glasses in the performance of his work (R. 123). Just before he mounted the stirrup of the coal car "this barrel was twelve feet away" (R. 116, 130) to the north of him (R. 158, 159). These were the "drums" (barrels) which he subsequently "came into contact with" (R. 126, 99).

The engine pushing the loaded gondola car was going north. At the time the gondola approached him he was standing "back five feet" from the tracks (R. 116). Before

* The plat (R. 169) shows that Moore Avenue at the scene of the accident was inside the plant. It was approximately 125 feet from the gates of the plant. (R. 111.)

he stepped on the northwest corner of the car (R. 130), he looked in all directions. He had a clear view of the whole situation (R. 116). He had full authority to stop the train if the way was not clear (R. 110). After he got on the end of the car he noticed that the obstruction (barrel of oil) would not clear him (R. 99). As a consequence his right leg was pinched or "drug" between the barrel of oil and the car, (R. 99, 130) sustaining injuries to that leg.

The petitioner testified that he was familiar with Rules 105B, 108 (R. 109)* and with Safety Rule 1507 (R. 109, 158)† which were in full force and effect on the day of the accident, (R. 109-110); that it was his duty to enforce Rule 1507 (R. 109) and to see that a car moved into an industry "would travel in free and clear of obstructions" (R. 110).

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* Rule No. 105-B: Provided in substance that both the conductor and the enginemen are responsible for the safety of the train and observance of the rules, and under circumstances not provided for by the rules, must take every precaution for protection.

Rule No. 108: Provided in substance that in cases of doubt or uncertainty a safe course must be taken.

† Rule No. 1507: Maintain lookout in the direction engine or car is moving, to avoid coming in contact with structures alongside of or over tracks, or with cars, engines or trains on an adjacent track. (Bridges, buildings, coal chutes and aprons, fences, cattle guards, main cranes, platforms, poles, stock chutes or pens, switch standards, lamps, targets, signals, tunnels, standpipes, etc.)

VI.

ARGUMENT.

A.

The Appellate Court correctly found that petitioner's evidence failed to establish negligence on the part of this respondent.

The petitioner suggests that this respondent was negligent in two particulars, i. e.:

(1)

Failure to furnish the petitioner with a reasonably safe place to work.

(2)

Failure of other members of the crew to warn petitioner of a danger, (which in so far as it appears from the record, he was the only member of the crew who knew of its existence).

that the Appellate court, therefore erred in reversing the judgment of the trial court.

In respect to the first of these propositions (alleged failure of this respondent to furnish a safe place to work), the Appellate Court said (R. 5-6):

> "The only theory upon which the railroad company could be charged with failing to use reasonable care in affording plaintiff a safe place to work was in the failure to keep this track clear of impedimenta. At the time and place of this accident, according to his own testimony plaintiff himself was the agent of the railroad company charged with the duty of keeping this spur track clear for the safe movement of his train. Under such circumstances, this became a safe or an unsafe place to work according to whether or not plaintiff performed or failed to perform his duties.

> That he recognized his obligation in this respect is indicated by the fact that he directed the watchman employed by the defendant Mallory Company to remove the offending barrels the first time the train proceeded down this portion of the track. If he had followed up his directions to the policeman to remove the barrels by an inspection it would have been apparent that they had not been removed. While contributory negligence constitutes no defense under the Federal Employers' Liability Act, nevertheless some underlying act of negligence on the part of the employer must be established before he is liable to the servant. The plaintiff has proven no negligence on the part of the railroad company in the care used to afford plaintiff a safe place to work."

The record shows without dispute* that it was petitioner's duty upon entering the Mallory premises to see that everything was clear, so that he could perform the duties assigned him, i. e., the removal of an empty coal car and the spotting of a loaded car of coal.

In the performance of these recognized duties, he entered the Mallory plant to make this inspection. He says he went ahead to see if the way was clear before he brought the cars in; that this was his job (R. 125).

He walked northward to Moore Avenue about a distance of 125 feet where he saw the barrels on the track, north of Moore Avenue. He directed the Mallory policeman to remove them. He then continued northward to the northerly end of the track, a distance of 250 to 300 feet. Somewhere north of Moore Avenue the loaded car of coal was coupled to the standing empty coal car, and the petitioner rode in between the cars, to Moore Avenue where he stepped off on the pavement.

The petitioner had arrived at the Mallory plant at four o'clock in the afternoon of July 18, 1945. The accident

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* The respondents offered no factual evidence as to the occurrence (R. 167, 168).

occurred at 4:20 P. M. From the time the petitioner first saw the barrels until the accident, not more than ten or fifteen minutes had elapsed.

At the time of the accident, one brakeman was in the Pennsylvania yard (R. 131) and the other was riding on the opposite, or east side of the loaded coal car, at the time of the occurrence (R. 131-132). There is no evidence which even remotely suggests that any member of the crew saw, could have seen, or even knew of the presence of the barrels adjacent to the track.

The other members of the crew were available, but were not called as witnesses for petitioner (p. 20, Petition of petitioner).

This respondent suggests that there is not even a scintilla of evidence in the record which shows or even tends to show that it was guilty of any negligence which proximately contributed in whole or in part to the injuries of the petitioner.*

This court has repeatedly asserted that a plaintiff to recover in an action based upon the provisions of the Federal Employers' Liability Act (45 U. S. C. A. 51-60) must establish two essential elements, i.e.; first, that the railroad company was negligent, and second, that such negligence was the proximate cause in whole or in part of the occurrence. (*Reynolds* v. *Atlantic Coast Line*, 336 U. S. 207; *Eckenrode* v. *Pennsylvania R. R. Co.*, 335 U. S. 329; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 484; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67).

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* In *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, (p. 32), this court said that the "petitioner was required to present probative facts from which the negligence and the casual relation could reasonably be inferred". And in *Brady* v. *Southern R. Co.*, 320 U. S. 476 (p. 479), this court said there must be "more than a scintilla" of evidence before a jury question is presented.

It is respectfully suggested that the petitioner has failed to prove either of these elements essential to his recovery.

He was intimately familiar with the premises, through long experiecne working in and about the Mallory plant. As conductor he was in full and complete charge of the operation from its inception. The record shows that the only thing in or about the track to interfere with the movement of the train was the barrels in question. As he stood on Moore Avenue in broad daylight, he was at all times within ten or twelve feet of the barrels which were the cause of his injury. He was a railroad man of long experience. (32 years, R. 92). Even a glance in that direction would have been sufficient to show a lack of clearance. Yet with this knowledge and experience, he mounted the stirrup of the approaching car, and "took a chance" apparently that the clearance was sufficient.

This respondent earnestly submits this case clearly falls within the category of that class of cases decided by this court which have held that where the plaintiff's injury was *solely and proximately* caused by his own conduct there can be no recovery. (*Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329; *Hunter* v. *Texas Electric Ry. Co.*, Tex. 194 S.W. (2d) 281, aff'd. 332 U. S. 827.)

This court has held that, "The carrier's negligence must be a link in an unbroken chain of reasonably forseeable events."* This respondent if it had knowledge of the close proximity of the barrels to the track (which of course it did not) could not have anticipated in the exercise of reasonable care, that the petitioner would leave a place of safety five feet from the track (R. 116), and elect to mount the passing coal car with the barrels only ten or twelve feet away from where he stood.

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* *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 484.

This court, under circumstances similar or identical to those in the instant case has repeatedly denied certiorari.*

We submit that there is no evidence showing or tending to show any negligence on the part of this respondent. The petition for certiorari should, therefore, be denied.

(2)

With respect to the second of the above propositions under this heading, (the alleged negligence of members of the crew as a contributing cause of petitioner's injuries), the appellate court said (R. 7-8):

> "As this train approached Moore Avenue after having disposed of the empty car, plaintiff was standing on the west side of the track at the north end of the arc made by the curve in the tracks from the Mallory Company's gate to Moore Avenue. He was standing according to his own testimony, within either ten or twelve feet of the transgressing barrels or drums. It was a clear, bright, July afternoon. Plaintiff had an obligation to see that the barrels had been removed and was standing in such a position that he could not have failed to have seen the location of these barrels had he looked. The fact that he may have been required by company rule to have guarded the Moore Avenue crossing did not, in view of the circumstances in this case, prevent him from observing the condition of the track ten or twelve feet away. It is not apparent from the record just what opportunities the other members of the crew had at this time to observe the position of the barrels. One brakeman was on the opposite side of the car, whether on the front or rear car does not clearly appear from the record. It is to be assumed that the engineer and fireman were at their places at the right and left side of the cab re-

* This is adverted to simply as a statement of fact. We are aware that this court has said that its denial of a certiorari imports no expression of an opinion on the merits. (*Sunal* v. *Large*, 332 U. S. 174; *House* v. *Mayo*, 324 U. S. 42, 48); *Beamer* v. *Virginian Ry. Co.*, 181 Va. 650, 26 S. E. (2d) 43, cert. den. 321 U. S. 763; *Lasagna* v. *McCarty* (Utah) 177 P. (2d) 734, cert. den. 332 U. S. 829; *Wolfe* v. *Henwood* (8th Cir.) 162 F. (2d) 998 cert. den. 332 U. S. 773; *Fantini* v. *Reading Co.* (3rd Cir.) 147 F. (2d) 543 cert. den. 325 U. S. 856; *Waller* v. *Northern Pacific Term. Co.* (Or.) 166 P. (2d) 488, cert. den. 329 U. S. 742.

spectively. There is considerable question, in view of the curve upon which the train was approaching, whether the engineer and brakeman could clearly see the barrels. The fireman and plaintiff were on the same side of the engine, but whether the former was keeping a lookout from the cab or whether he was engaged in some other duty in the cab does not appear from the evidence. It could hardly be considered negligence on his part, however, knowing plaintiff to be riding the front end, if he were engaged in firing the boiler or some other required duty within the cab. In view of the silence of the record on these questions we can indulge in no speculations upon which to predicate a finding of negligence. It is certain that the plaintiff was in a position to ascertain where the barrels were located and that he had an obligation to see that they were in such position as not to afford danger to the engine or the crew. Without any intimation to the crew, as far as the record discloses, plaintiff stepped upon the stirrup of the lead car as the train reached him and within an interval of a few feet was injured. Under these circumstances we do not believe that there was any negligence on the part of the railroad company separate and apart from the negligence of the plaintiff."

Petitioner's argument in this respect is similar to the argument made and rejected in *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329.† The appellate court correctly found that (R. 9):

> "There is no proof in the record that any member of this crew **in the exercise of due care could have prevented this injury that the plaintiff voluntarily and suddenly placed himself in a position of danger, the presence of which he was in the best position to judge.**" (Emphasis supplied)

In *Brady* v. *Southern R. Co.*, 320 U. S. 476 at page 483, this court said:

> "Events too remote to require reasonable prevision need not be anticipated."

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† Cf. *Hunter* v. *Texas Elec. Ry. Co.* (Tex. 1946) 194 S. W. (2d) 281, aff'd 332 U. S. 827.

We submit that the occurrence in question clearly falls within this category.

B.

The appellate court did not err in holding that the trial court should have directed a verdict for the respondents, because there was insufficient evidence of negligence to submit that question to the jury.

As this respondent suggested under the proceeding heading (p. 9), before the plaintiff is entitled to recover under an action based upon the Federal Employers' Liability Act, he must establish negligence on the part of the railway company which contributed in whole or in part to his injury.

This court, as far as we are advised, has never held that every case under this Act must be submitted to a jury. On the contrary it has repeatedly held that the petitioner is required "to present *probative facts, from which negligence and the casual relation could be reasonably inferred.*"*

The jury are not permitted to indulge in "mere speculation" or substitute such speculation for "probative facts".†

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, this court in discussing the effect of the 1939 Amendment to the Federal Employers' Liability Act, said (p. 67):

> "They leave for practical purposes only the question of *whether the carrier was negligent* and *whether that negligence was the proximate cause of the injury.*

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* *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32; cf. *Brady* v. *Southern R. Co.*, 320 U. S. 476, 484.

† *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32; *Brady* v. *Southern R. Co.*, 320 U. S. 476, 484; cf. *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329.

> In this situation the employers' liability is to be determined *under the general rule which defines negligence as the lack of due care under the circumstances;* or the failure to do what a reasonable and prudent man would ordinarily have done under circumstances of the situation; or doing what such a person under existing circumstances would not have done." (Emphasis supplied)

The evidence (detailed under prior headings) shows that the petitioner knew and saw the location of the barrels; that he ordered them moved in the performance of his duties as conductor in charge of the crew, to provide clearance for the train and its crew, to enter and leave the Mallory plant in safety. There was no other evidence that even remotely suggested that the other members of the crew ever saw, or knew the presence of the barrels in question, as the appellate court found in its opinion. The petitioner at all times stood not more than ten or twelve feet from these barrels and knew they were there as he mounted the stirrup of the coal car moving two to three miles per hour.

It is most respectfully urged that these facts not only fail to show any negligence on the part of this respondent, but on the contrary conclusively demonstrate that plaintiff's injuries were solely and proximately sustained as a result of his own conduct.

The petitioner infers in his argument that even if he was guilty of contributory negligence that he was not thereby barred from his action against this respondent. It is sufficient answer to that contention to say the respondent did not base its defense on this ground. It contended in the trial court and in the Appellate Court that petitioner's injuries solely and proximately resulted from his own conduct and without any negligence on the part of this respondent. (R. 184, 199)

In *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, this court said that the weight of the evidence under the Federal Employers' Liability Act "must be more than a scintilla" (p. 479), and in laying down the rule when a verdict should be directed said (pp. 479, 480):

> "When the evidence is such that **without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict,** the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." (citing authorities) (Emphasis supplied) *

Petitioner's assertion that this respondent was negligent amounts in substance to a contention that the railway company was negligent in failing to assign its yardmaster or other supervisory employee, to see, that the petitioner not only performed his assigned duties, but also to watch over him and prevent him, if necessary, from injuring himself by his own wilful conduct.

No such duty was imposed by law upon this respondent.†

We respectfully submit that the appellate court did not err under these facts in holding that the trial court should have directed a verdict.

The petitioner adverts to certain cases (decided by this court and by the courts of review of the State of Illinois) as authority for his assertion that there was evidence of negligence which required submission of the case to the

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* This court has often refused certiorari to state courts where a verdict was directed in the state court because the evidence failed to show any negligence on the part of the railway company (see, appendix to Mr. Justice Douglas' opinion in *Wilkerson* v. *McCarthy*, 336 U. S. 53 at p. 72).

† *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476; *Hunter* v. *Texas Elec. Ry. Co.* (Tex.-1946) 194 S. W. (2d) 281, aff'd. 332 U. S. 827.

jury. With the rules of law laid down in the cited authorities, we have no quarrel. In each of the cited cases there was factual evidence (totally lacking in the present case) of negligence on the part of the railway company. It would, therefore, serve no useful purpose to recite the facts in each cited case and demonstrate their inapplicability to the facts in the present case.

We respectfully suggest that what the Utah Supreme Court said in disposing of a case under facts almost identical with the facts in the present case, is particularly appropriate.*

C.

Petitioner's injuries solely and proximately resulted from his violation of well known rules of the respondent which it was his duty as conductor in charge of the switching operation to enforce and himself obey.

At the time of this occurrence there were certain railway rules in force and effect concerning petitioner's duty in connection with the operation and conduct of the switching operation.† (Rules 105-B, 108, and Safety Rule 1507)

The petitioner testified it was his duty to enforce these rules and to see that a car moved into an industry "would travel free and clear of obstructions." (R. 110). As we suggested above, it was petitioner's duty not only to obey, but to enforce obedience to these rules.

While it is true that the Appellate Court did not directly base its decision on this ground, it recognized and applied the rule of law that where the injury *solely and proximately*

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* In *Lasagna* v. *McCarthy* (Utah) 177 P. (2d) 734, cert. den. 332 U. S. 829, it was said that, "it would be unreasonable to hold that in a suit by the employee, his own negligence is the negligence of his employer."

† The substance of these rules is shown in a footnote in this brief, see p. 6.

resulted from the plaintiff's direct violation of a known rule, there can be no recovery under the provisions of the Federal Employers' Liability Act.‡

The petitioner knew the company rules with reference to safety requirements in the movement of trains. He was in charge and could have stopped the train movement at any time. He knew and saw the danger, notwithstanding his knowledge of these facts, he voluntarily elected to leave a place of safety and to go into a position of danger. As the sole and proximate result of his conduct in this respect he sustained the injuries about which he now complains.

CONCLUSION

It is respectfully suggested that in view of the foregoing reasons, this court should deny the writ of certiorari prayed for by the petitioner.

Respectfully submitted,

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‡ *Hunter* v. *Texas Elec. Ry. Co.* (Tex.) 1994 S. W. (2d) 281 aff'd. 332 U. S. 827; cf. *Lasagna* v. *McCarthy* (Utah)) 177 P. (2d) 734, cert. den. 332 U. S. 829; *Willis* v. *Pennsylvania R. Co.*, (2d Cir.) 122 F. (2d) 248, 249, cert. den. 314 U. S. 684; *Missouri Pac. R. Co.* v. *Guy* (Ark.) 157 S. W. (2d) 11, 14, cert. den. 317 U. S. 702.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

ALVIE KILLION,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Respondents.

No. 876 130

BRIEF OF RESPONDENT P. R. MALLORY COMPANY, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinion Below.

The opinion of the Appellate Court of Illinois appears in 336 Ill. App. at 152.

Jurisdictional Statement.

Respondent Mallory respectfully suggests that this Court lacks jurisdiction of this cause so far as this respondent is concerned for the following reasons:

1. Petitioners did not set up or specially claim in any Illinois Court any Federal right, constitutional or statutory, with respect to respondent Mallory.

2. Petitioner's sole attempt to raise a Federal question here, so far as Mallory is concerned, is his assertion that he was denied the substance of a trial by jury. Petitioner's

counsel have overlooked this Court's repeated holdings that there is no Federal constitutional right to a trial by jury in a State Court.

3. Petitioner seeks to have this Court's writ of *certiorari* directed to the Appellate Court of Illinois. That Court is not the highest court of the State in which a decision could be had. Petitioner says that the Appellate Court, not the trial court, deprived him of constitutional rights. If that be true, petitioner had an absolute right to a writ of error from the Supreme Court of Illinois under the well settled rule that where a litigant contends that he has been denied a constitutional right in the Appellate Court, writ of error from the Illinois Supreme Court is a matter of Illinois constitutional right. (See authorities cited in Argument, *post.*)

Statement of so much of the case as is material to show that the record presents no Federal Question with respect to respondent Mallory Company.

Petitioner, a Pennsylvania conductor, having sustained injuries when his leg failed to clear an oil drum on the premises of respondent Mallory Company and in dangerous proximity to a spur of track on which respondent Pennsylvania's train was operating, sued the Pennsylvania under the Federal Employers Liability Act (U.S.C.A.) and joined the Mallory Company as co-defendant, predicating his alleged cause of action against Mallory wholly on State substantive law of negligence.

A jury in the trial court returned a verdict for $10,000. Motions for a new trial and for judgment *non obstante veredicto* were denied. Judgment was entered on the verdict as to both respondents. (Tr. 67).

Illinois' Appellate Court for the First District, a State court of intermediate appellate jurisdiction, found that, as

to the Pennsylvania, there was no negligence and as to Mallory, the plaintiff was guilty of contributory negligence which under Illinois law exonerated Mallory from liability. (Tr. 1-13).

Petitioner, instead of suing out the writ of error which is appropriate and a matter of right where there is a substantial claim that an Appellate Court has deprived a litigant of a constitutional right, (See Argument, *post*) sought, *without suggesting any Federal question as to Mallory*, leave to appeal from the Illinois Supreme Court. (Tr. 1-635). The Illinois Supreme Court denied the leave to appeal thus sought. (Tr. 224 and 225).

Respondent Mallory resists petition for *certiorari* solely on the jurisdictional grounds hereafter noted and argued. Therefore, it makes no statement of the facts of the accident but refers this Court to the Illinois Appellate Court's opinion for a narrative of the nature of the case and of petitioner's substantive claims.

At no time did petitioner ever assert in any Illinois court any claim of Federal right with respect to Mallory. Respondent Mallory, relying on the rule that suggestion and preservation in the State court of a claim of Federal right is an absolute prerequisite to this Court's jurisdiction, moves this Court to dismiss this petition as to this respondent for want of a Federal question raised and preserved in the record of the State court proceedings.

Even now, the only Federal question sought to be raised as to Mallory is based upon petitioner's claim that he was denied the substance of a trial by jury as to Mallory, as well as to Pennsylvania. Petitioner's brief seems to have been written in complete ignorance of this Court's repeated holdings that there is no Federal right to a trial by jury in State courts, at least where the cause of action arises wholly under State law.

Petitioner does argue against Mallory that the Illinois Supreme Court misconceived the import of its own prior decisions so far as Mallory is concerned. We make no reply to this argument. We rest upon the axiom that this Court lacks jurisdiction to review a State court's exposition of State substantive law and will not reverse even though convinced that the State court erred in its reading of the State's constitution, statute, judicial precedents or other law.

ARGUMENT.

I.

Petitioner raised no Federal Question in any State Court as to Respondent Mallory. Nor, if there were a Federal Constitutional Question as to Mallory, is the Appellate Court the Highest Court of Illinois in which a decision might be had. He had an absolute right to a writ of error from the Illinois Supreme Court.

Nowhere in the record will there be found any invocation by petitioner of Federal law, constitutional or statutory, with respect to respondent Mallory.

Failure to assert and preserve a Federal question in the State courts is fatal to this Court's jurisdiction. *Wilson* v. *Cook*, 327 U. S. 474. *Mellon* v. *O'Neill*, 275 U. S. 12. The rule is not new. This Court so held in 1817. *Inglee* v. *Coolidge*, 15 U. S. 363.

Of course, petitioner was not bound to assert any constitutional question in the trial court, since he prevailed in that court on every issue. But when the Appellate Court reversed the trial court, if its action raised a substantial constitutional question, petitioner's course was clear under the applicable Illinois law. Where a litigant prevails in the trial court but conceives that he has been denied a constitutional right by the Appellate Court, he has, if the question is substantial, an absolute right to a writ of error from the Supreme Court of Illinois to review the Appellate Court's judgment. *Hallberg* v. *Goldblatt Bros.*, 363 Ill. 25, is a leading case expository of this rule.

Petitioner did not sue out such a writ of error. Instead, he filed a petition for leave to appeal. *In this petition he*

nowhere mentions any constitutional rights as to either respondent. He does not maintain any claim of Federal right of any kind as to Mallory.

There is no Federal question appropriately asserted and properly preserved as to Mallory. Hence this Court lacks jurisdiction to review, certainly as to Mallory.

II.

Petitioner's only Federal Claim here as to Mallory is his contention that he was denied his "Constitutional right to a trial by jury." But the Federal Constitution guarantees no such right in State Courts. Therefore, there is no basis for Claim of Federal Right.

Petitioner's counsel assumes, as do many lawyers, that denial of the right to trial by jury in a State court violates either the Sixth or the Fourteenth amendment.

But this, of course, is simply not so.

There is no Federal constitutional right to a trial by jury in a State court. *Maxwell* v. *Dow,* 176 U. S. 581. This is the rule even in a capital case. *Frank* v. *Magnum,* 237 U. S. 309. And there is no violation of Federal constitutional rights even where this court can perceive that a trial by jury was denied in violation of State constitutional provisions. *Iowa Central R.R.* v. *Iowa,* 160 U. S. 392.

Since Illinois need not grant a trial by jury at all, so far as this Court is concerned, *a fortiori* it may partition the function of drawing inferences, conclusions and the like between juries and reviewing Courts in any manner that it sees fit.

In any event, no Federal question was raised with respect to Mallory. (See Point I, *ante.*)

III.

Petitioner's other Criticisms of the Appellate Court's opinion raise only questions of State Law.

Petitioner collates and compares Illinois decisions earlier than the decision in the instant case to sustain an argument that the Illinois courts have not decided petitioner's case in accordance with the Illinois law of negligence and contributory negligence.

Of course, this argument raises only questions of State law. Such questions are not reviewable here. This is true, *inter alia,* where it is contended that the State Court misapplied State decisions that, properly applied, would have required a contrary result. *Brinkerhoff Trust Co.* v. *Hill,* 281 U. S. 673.

IV.

The Judgment is severable as between Pennsylvania and Mallory. There being no Federal question as to Mallory, Certiorari should not be granted as to it.

So far as Mallory is concerned, this case presents no question of which this Court has jurisdiction. As we have pointed out, the only alleged Federal question as to Mallory is suggested by petitioner's contention that Illinois has deprived him of the substance of trial by jury. But there is no Federally guaranteed right to a trial by jury in a State court (Point II, *ante*) and in any event no Federal right as to Mallory was claimed in any Illinois court. (Point I, *ante*).

Where the questions presented by several parties are severable, as they are in this case, this reversal as to one does not require reversal as to the other, nor does jurisdiction as to the one party impart jurisdiction as to the

other party. *James Dickenson Farm Mortgage Co.* v. *Harry,* 273 U. S. 119.

CONCLUSION.

We respectfully submit that for the reasons stated in the brief, the petition for *certiorari* should be dismissed as to respondent Mallory.

Respectfully submitted,

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